United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2037

To be argued by
JOAN P. SCANNELL

76-2037
T-5891

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PAUL ROBINSON, :

Petitioner-Appellant, :

-against- :

WARDEN, Auburn Correctional Facility, State of New York, District Attorney Kings County, :

Respondents-Appellees. :

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BRIEF FOR RESPONDENT-APPELLEE

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BRIEF FOR RESPONDENT-APPELLEE

Petitioner-appellant appeals from a decision of the United States District Court for the Eastern District of New York (Mishler, J.) dated March 10, 1976, denying petitioner-appellant's application for a federal writ of habeas corpus.

Questions Presented

1. Whether the Judge's charge on the statutory affirmative defense to felony murder shifted the burden of proof on the presumption of innocence and

required petitioner to admit participation in the underlying felony. Further whether the Judge's charge in its entirety correctly instructed the jury on the law.

2. Whether petitioner's failure to object to the Judge's charge constitutes deliberate bypass of state court remedies and precludes federal habeas corpus review.

Preliminary Statement

Petitioner-appellant ("petitioner") was convicted after a jury trial in the Supreme Court, Kings County (Starkey, J.) of the crimes of Felony Murder, Attempted Robbery in the First Degree and Attempted Grand Larceny in the Third Degree. Petitioner was sentenced to fifteen years to life imprisonment on the murder charge, a maximum of ten years on the attempted robbery charge and a conditional discharge on the attempted grand larceny charge; the sentences to be served concurrently. The conviction was affirmed by the Appellate Division, Second Department, 43 A D 2d 908 (2d Dept. 1974) and the New York Court of

Appeals 36 N Y 2d 224 (1975). Petitioner then sought federal habeas relief resulting in this appeal.

Statement of Facts

A. The Crime

On August 13, 1971, Germaine Phillips was shot and killed in Lincoln Terrace Park. On the night of the murder the deceased and her boyfriend, Alberto Greene, were leaving Lincoln Terrace Park when three men, Gargo, George and petitioner, walked past them. A few feet past them the perpetrators stopped and reversed their direction ultimately surrounding the deceased and Greene (27).* Greene was then ordered by the man in the center of the group, believed to be George and who had his hands pointed toward Green's face, to empty his pockets. Greene told them that he did not have any money. He then heard a click coming from his right and noticed that the man to the right, believed to be Gargo, was wielding a knife. Greene backed up when he noticed that the man in the middle who had originally asked him for the money had a gun to his stomach. Greene again heard a click, so he

*The numbers in parenthesis refer to the pages of the original transcript of trial. The transcript has been submitted to this Court.

attempted to run out the exit but the man on the left, identified as petitioner, backed up against the wall barring him from using that exit. As Greene was backing up the man in the middle pointed the gun towards his stomach and fired. Greene was not shot. Greene then heard another click and grabbed the deceased's hand and started running to the center of the basketball court but turned back since there was no exit. At this point Greene realized that Germaine Phillips was bleeding so he called for help (28-30).

B. Prior Proceedings

Subsequent to the murder, Greene identified two individuals named Rudolph Mills and Glen Darien as two of the perpetrators. Both these men were later tried and convicted in the Supreme Court, Kings County of the murder of Germaine Phillips. Prior to sentencing, petitioner appeared outside the courtroom and told Detective Iannuccilli that the men who were convicted of the murder were in fact innocent. Petitioner also admitted that he was in the park at the time of the shooting and identified the two other perpretrators as

Gargo and George. The conviction of Mills and Darien was subsequently set aside.

C. The Trial

At trial Rudolph Mills testified that on the night of the murder, George, petitioner, and others were present in his apartment (91). Petitioner and Gargo had a conversation relative to going out after some money. Someone whose identity he could not recall said "We are urgently in need of some money." Before they left his apartment, petitioner told Mills that George had a gun (92). About 2 A.M. appellant Gargo and George returned to his apartment. They were breathing and sweating heavily. They all told him what happened. Petitioner started to tell him that they had gone to the park in search of money. They saw a man and a girl. George told the man to empty his pockets. The man dipped his hand into his pocket and backed away so George fired some shots. They heard someone scream so they ran (93). Mills also testified that he was tried and convicted of the murder in question and that he was informed that petitioner had come forward and said that he (Mills) was not guilty.

Mills further testified that his conviction would be vacated after he testified at this trial (94). Mills explained that he did not name Gargo, George and petitioner at the time of his own arrest because he was in fear of reprisals (129-130).

Petitioner testified that on the night of the killing he left Mills' apartment around 11:30. On his way home he met Gargo and George who informed him that there was a music festival being held in Lincoln Terrace Park (152-155). They all attended the music festival for about four minutes. Petitioner lost the others in the crowd so he started home. En route home through the park he heard one of them (Gargo or George) call him from behind (157). They stated that they were going to look at a prostitute (159). He turned around and noticed a man and woman embracing. Since they were not having sexual relations but merely embracing, petitioner figured it was not a prostitute so he started home (160). As he was proceeding in the direction of his home, George and Gargo reversed and started walking in his direction passing him. George walked about two yards in front of petitioner when he reached Mr. Greene. Greene further

testified that George then pulled something Greene didn't know what it was although he knew Gargo had a knife (16). Gargo then told Greene to give him everything he had to which Greene replied, "you'll have to take it" (162). Greene then moved in petitioner's direction and petitioner moved towards the fence (161). The deceased ran towards petitioner. Gargo, holding a knife, said "Move and let me cut him". When Greene placed his hand in the direction of his back pocket, George fired. When Miss Phillips moved in the direction of Greene she was shot (163-165). Petitioner denied having any conversation with George and Gargo about committing a robbery. He further denied knowledge of their intent to commit a robbery and the fact that they were armed with a gun and a knife. Both George and Gargo had died prior to trial (168). Petitioner further testified that after the incident he returned alone to Rudolph Mills' apartment and told him what happened (171-172). He knew that Mills and Darien had been standing trial for the robbery and killing and that they had no connection with it. He never told anyone because he feared Gargo and George would kill him (173-174). After Gargo died he sought out George to tape any dis-

cussion he might have with him but he did not find George. About three weeks after Gargo's death, he was shot in the leg by friends of George and Gargo (175-176). Later he disclosed to Detective Iannuculli and Mr. Lombardo that he had been in the park at the time of the incident (181-182). When he first spoke to Detective Iannuculli he did not disclose that he was at the scene of the crime (198). Detective Iannuculli testified that on the day that Darien and Mills were to be sentenced he asked petitioner to come to the Courthouse. At the Courthouse he showed petitioner a group of photographs including those of Gargo and George. Petitioner then started questioning the detective about how much time Darien and Mills would be sentenced for (47-48). At this point petitioner identified the photographs of Gargo and George as being those of the perpetrators and stated that Darien and Mills were innocent. Petitioner stated that he was with Gargo and George on the night of the homicide and that Gargo had a knife and George a gun.

Petitioner told him that he had met the two on his way home and they all went looking for a prostitute and a pimp. He then stated that Alberto Greene and

Germaine Phillips were in the park and George told Greene to empty his pockets. Greene then reached for his own pocket at which point George fired the gun and the girl was shot (49). Detective Iannuccilli then advised petitioner of his rights and accompanied him to the District Attorney's office. En route to the District Attorney's office the petitioner stated that they were looking for a prostitute and a pimp to "take them off" (49-50). At the District Attorney's office Robinson gave a statement which was offered in evidence at trial as Exhibit "2".

POINT I

THE JUDGES CHARGE ON THE STATUTORY AFFIRMATIVE DEFENSE TO FELONY MURDER DID NOT SHIFT THE BURDEN OF PROOF AS TO THE PERSUMPTION OF INNOCENCE AND DID NOT REQUIRE PETITIONER TO ADMIT PARTICIPATION IN THE UNDERLYING FELONY. FURTHER THE JUDGE'S CHARGE IN ITS ENTIRETY CORRECTLY INSTRUCTED THE JURY ON THE LAW.

Despite the absence at the time of trial of a request to charge or an objection to the charge, petitioner now claims that the Trial Judge's jury charge

on the statutory affirmative defense, to felony murder, shifted the burden of proof and required petitioner to admit participation in the underlying felony. This, plus the allegedly improper phrasing of the charge, allegedly deprived petitioner of a fair trial. These claims are without merit.

A. The Judge's instruction on the affirmative Defense to Felony Murder Did Not Shift The Burden of Proof and Did Not Require Petitioner to Admit Participation in the Underlying Felony.

Petitioner contends that in a felony murder trial, where a defendant denies participation in the underlying felony, a jury charge on the statutory affirmative defense to felony murder will require a defendant to prove his own innocence. Petitioner has wholly misconstrued the felony murder statute and its concomitant affirmative defense. As the District Court noted in its decision the felony murder doctrine is a basic principle in our criminal law rooted in common law. The fundamental concept of felony murder is that if one participates in a felony such as an attempted robbery, and during the course of that attempted robbery someone other than a participant is killed, all the

participants are automatically guilty of the murder, regardless of intent or whether they perpretrated the murder. In such a trial all the prosecution must prove for a conviction is participation in the underlying felony and the fact that a murder was committed during the course of that felony. Each participant will be deemed guilty of the murder through the doctrine of transferred intent. People v. Wood, 8 N Y 2d 48 (1960).

To alleviate the sometimes harsh results of this "rigid automatic" doctrine an affirmative defense was engrafted upon this doctrine whereby a participant in the underlying felony could avoid an automatic murder conviction. Practice Commentaries, McKinney's N.Y. Penal Law, 4125.25 at 401. See also: McKinney, Proposed New York Penal Law, 1964, Commission Staff Notes p. 340. Thus even though a defendant is proven guilty of the underlying felony he can be acquitted of the murder if he proves by a fair preponderance of the evidence that he did not commit the murder, was unarmed, did not know his co-participants were armed, and did not know they were going to engage in conduct likely

to result in death or serious physical injury. New York Penal Law § 125.25(3).

To say that this affirmative defense requires an admission of guilt, or shifts the burden of proof, completely misconstrues the meaning of the statute. The prosecution must still prove participation in the underlying felony. The effect of a charge on affirmative defense, is to give a defendant the benefit of alternatives, that is, if the jury finds a defendant guilty of the underlying felony, they can still acquit a defendant of the murder. It is respectfully submitted that in the instant case had the Judge neglected to charge the jury on the affirmative defense, he would have committed error in that once the jury found that petitioner had participated in the attempted robbery it would have been bound to find him guilty of the murder. It seems incredible that petitioner should now claim error in charging the jury on affirmative defense.

Moreover, petitioner's testimony supported the judges charge and amply demonstrated that the affirmative defense does not require a defendant to admit participation in the underlying felony. Petitioner admitted being present at the scene of the crime, yet he denied participation in the attempted robbery, he claimed he was unarmed, and he denied knowledge that the others were

armed.

The cases which petitioner cites in support of his theory are clearly distinguishable from the case at bar. In the case of Mullaney v. Wilbur, 421 U.S. 684 (1975) the Supreme Court reversed a conviction, because a defendant in order to reduce a charge of murder to manslaughter, must prove that he committed the murder in the heat of passion. The effect of this requirement was interpreted by the Court to relieve the prosecution, of its burden to prove the elements of the crime beyond a reasonable doubt and to unconstitutionally require the defendant, to disprove the most essential element of the crime of murder, that is, malice aforethought. In the instant case, the affirmative defense in no way alleviated the prosecution of their burden of proof on any of the elements of the crime. From its common law inception to this day, all that need be proven in a felony murder prosecution is participation in the underlying felony and a commission of a murder by one of the participants, during the course of that felony.

In the instant case the judge properly charged the jury that the prosecution must prove beyond a reasonable doubt that petitioner was a participant in the underlying felony. Thus the Court complied with In re Winship, 397 U.S. 358 (1969) requiring proof beyond a reasonable doubt of any element necessary to prove the crime charged. Unlike Mullaney where it was noted that "'malice aforethought and heat of passion on sudden provacation are inconsistent things,'" (id. at 686-687) (emphasis supplied), thus requiring the defendant to prove the latter in order to negate the former, petitioner's affirmative defense can be viewed as wholly independent of the prosecution's proof and accordingly no shift of the burden of persuasion was occasioned by the instant affirmative defense.*

*The statutory affirmative defenses available are that the defendant (a) inter alia did not commit the homicidal act; (b) was not armed with a deadly weapon; (c) had no reasonable ground to believe that any other participant was armed with such a weapon and (d) had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury. N.Y. Penal Law § 125.25(3)(a)(b)(c)(d). Contrast with the prosecution's burden in a felony murder case where it is only required to prove beyond a reasonable doubt that the defendant committed the felony and in the course of the felony defendant or another participant caused the death of a person other than a participant. N.Y. Penal Law § 125.25(3).

The cases of Cool v. United States, 409 U.S. 100 (1972) and Stump v. Bennett, 308 F. 2d 111 (1968) are likewise distinguishable from the case at bar, since in those cases the jury was instructed to ignore defense testimony unless it believed the truth of such testimony beyond a reasonable doubt. These cases also shifted the persumption of innocence and relieved the prosecution of its burden of proof. The case at bar is in no way analgous to the above cases. Rather, as noted above at no time was petitioner required to prove his lack of participation in the attempted robbery.

B. The Phrasing of Jury Charge When Considered in its Entirety Correctly Instructed The Jury on the Law

Petitioner, in addition to claiming an alleged error in charging the jury on the affirmative defense, alleged that the court's charge mislead the jury as to the persumption of innocence and the people's burden of proof. This claim is likewise unsupported by the record.

This Court has consistently held that "... habeas corpus does not lie to set aside a conviction based on improper jury instructions save upon a clear showing that the errors were so egregarious to constitute a denial of due process. United States ex rel. Mitzner v. Dross, 403 F. 2d 42 (2d Cir. 1968); United States ex rel. Stanbridge v. Zelker, 514 F. 2d 45, 50 (2d Cir. 1975) cert. den. ___ U.S. ___; United States ex rel. Smith v. Montanye, 505 F. 2d 1355, 1359 (2d Cir. 1974) cert. den. ___ U.S. ___. The charge must so infect the entire trial that the trial is rendered fundamentally unfair. Cupp v. Naughten, 414 U.S. 141, 147 (1973); United States ex rel. Birch v. Fay, 190 F. Supp. 105, 107 SDNY (1961). The test for determining a violation of due process is indeed a strict one. Errors of a serious nature are not automatically deemed violative. In the case of Schaefer v. Leone, 443 F. 2d 185 (2d Cir. 1971) the Trial Judge failed to charge the jury on criminal intent. Even though this omission allegedly resulted in a conviction of a non-existent crime, this Court refused to find a violation of due process.

In the case at bar, a review of the Judge's charge reveals that petitioner was not deprived of due process of law. Neither the affirmative defense nor the way it was phrased required petitioner to prove his own innocence. The Trial Court clearly charged the jury that petitioner was presumed innocent and that the prosecution would have to prove him guilty of attempted robbery beyond a reasonable doubt. At the beginning of the charge the Trial Court stated:

> "... the defendant is presumed to be not guilty and that persumption still cloaks him and will continue to cloak him when you go into your jury room. And unless you are satisfied beyond a reasonable doubt the presumption of innocence, the presumption of his being not guilty, unless that has been rebutted you must return a verdict of not guilty." (252) (Emphasis Supplied)

Throughout the charge the Court reiterated the presumption of innocence and the fact that guilt must be proven beyond a reasonable doubt (253, 254, 267, 273).

Further, the Trial Court made clear in its charge that petitioner claimed he was not a participant in the crime robbery:

"... of course, the defendant states that he was not the participant (257)."

"They separated and found each other again. And he did not know that they were going to go into any - try to commit any robbery and in effect he was not acting in concert with them (261)."

Now the mere presence at the scene of a crime does not make you a participant in a crime. That's what you gentlemen have to decide.

Was this defendant present at the scene of the crime or was he a participant in the scene of the crime? (262). (Emphasis Supplied)

The Trial Court's charge also made clear that petitioner must first be proven guilty of the attempted robbery before he can be found guilty of murder and before any affirmative defense can be imposed. The Court charged that:

"The burden of proving that he participated in this crime, that he was acting in concert is on the People ... if you are satisfied as to that beyond a reasonable doubt.

> And unless you are satisfied beyond a reasonable doubt the presumption of innocence, the presumption of his being not guilty, unless that has been rebutted you must return a verdict of not guilty." (252).

Petitioner specifically objects to the portion of the charge where the Court stated:

> "The defendant says he was there but he was not a participant in the crime. He goes further than that. He has interposed what we call an affirmative defense." (265).

Petitioner claims that subsequent portions of the charge on affirmative defense necessarily infered that petitioner admitted commission of the underlying felony that is, the attempted robbery. This contention is clearly unsupported by the record. As stated earlier the affirmative defense is a statutory one and considering the evidence beneficial to petitioner. There was more than sufficient evidence to find that petitioner was a participant in the crime, thereby necessitating a charge on affirmative defense.

Rudolph Mills testified that petitioner, Gargo and George were in his apartment on the night in question, that petitioner and Gargo had a conversation about going out after some money and that prior to going out petitioner told him that George had a gun. Mills also testified that they returned to his apartment and told him what happened. This testimony coupled with the testimony of Greene that the man who was not armed, admittedly petitioner, had backed against the wall and blocked his exit, provided more than sufficient evidence to vitiate the claim of lack of participation. Petitioner claimed he was not armed and there was testimony to the effect that he was the unarmed man. This evidence provided grounds, that even if the jury found that petitioner participated in the robbery, he could still be acquitted of the murder based on the affirmative defense - namely that he did not commit the homicidal act, was not armed and had no reasonable grounds to believe that the other participants were armed or intended to engage in such conduct.

Further, as the District Court noted, a charge even if at times confusing does not automatically constitute a transgression of fundamental constitutional guarantees.

Moreover the portion of the charge which petitioner objects to cannot be viewed in isolation. As the Supreme Court stated in Cupp v. Naughton, 414 U.S. 141, 147 (1973):

> "In determining the effect of this instruction on the validity of respondents [state] conviction, we accept at the outset the well-established proposition that a single instruction may not be viewed in artificial isolation but must be viewed in the context of the overall charge. Boyd v. United States, 271 U.S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see Cool v. United States, 409 U.S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus, not only is the challenged instruction but one of many such instructions, but the process of instruction is but one of many components of the trial which may result in the judgment of conviction." 414 U.S. at 147.

Accord, United States v. Park, __ U.S. __, 44 L.Ed. 2d 481, 502-503 (1975); Byrd v. Hopper, 402 F. Supp. 787, 788-789 (N.D. Ga. 1975).

Indeed, this Court has enunciated this same rule with regard to its own appeals. E.g. United States v. Evans, 484 F. 2d 1178, 1187-1188 (2d Cir. 1973); United States v. Adreadis, 366 F. 2d 423, 434 (2d Cir. 1966). Certainly the state courts cannot be bound by any stricter test in collateral federal review.

A jury charge in a felony murder statute is often a most difficult one. In the instant case, any confusion as to the presumption of innocence was cleared up when the Trial Court unequivocally charged the following:

> "The burden of proving that he participated in this crime, that he was acting in concert, is on the People. In other words, if he were there with the intent to commit a crime and participates in it with the intent, then he is guilty, if you are satisfied as to that beyond a reasonable doubt.

On the other hand, if you are satisfied beyond a reasonable doubt that he was there, that he intended to participate, but he did not know that one of his fellow was armed -- and there is no proof that he, here, himself committed a homicide -- no proof that he was armed, but he must prove that he had no reasonable ground to believe that any other participant was armed and that he had no reasonable ground to believe that any other participant intended to engage in the conduct. The burden of proving that is on him. That's if you are satisfied beyond a reasonable doubt that he was not a mere spectator, if you are satisfied beyond a reasonable doubt that he was not. (265-68)

* * * *

Yet, if he attempted to commit the robbery, then the burden is on him of proving that he did not participate in the murder or that he did not know that others were armed, and so forth, as I outlined.

I don't want to tell you how to decide the case, but first, was there an attempted larceny? And if so, then, was that an attempted larceny by force, to make it an attempted robbery? And then, if you are not satisfied beyond a reasonable doubt as to that, then, of course, your verdict will be not guilty on all counts.

> If you are satisfied that there was an attempted robbery, an attempted grand larceny, and this defendant was a participant with the culpable mental state, then the question is, has he prevailed by a fair preponderance of the evidence on his defense of not knowing that the others were armed and had no reason for knowing, and so forth." (273). (Emphasis Supplied)

Thus it can be seen that the Trial Court in its charge relating to the affirmative defense made it abundantly clear that the jury must first be "satisfied beyond a reasonable doubt that he was not a mere spectator and "the burden of proving that he participated in this crime ... is on the People." Further, contrary to petitioner's allegation, it is clear that the Judge informed the jury that the defendant must prove his defense by a fair preponderance of the evidence rather than beyond a reasonable doubt.

In Cupp v. Naughton, supra which involved circumstances paralleling the case at bar, the judge charged that every witness is presumed to tell the truth. Since the defendant did not take the stand and had three prosecution witnesses testifying against him, the defendant claimed that the above charge shifted the burden

of proof and forced the defendant to prove his own innocence. The Court in refusing to find the conviction invalid stated at 149:

> "The jury here was charged fully and explicitly about the presumption of innocence and the State's duty to prove guilt beyond a reasonable doubt. Whatever tangential undercutting of these clearly stated propositions may, as a theoretical matter, have resulted from the giving of the instruction on the presumption of truthfulness is not of constitutional dimension. The giving of that instruction on the presumption of truthfulness is not of constitutional dimension. The giving of that instruction, whether judged in terms of the reasonable-doubt requirement in In re Winship, supra, or of offense against 'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), did not render the conviction constitutionally invalid."

POINT II

PETITIONER'S FAILURE TO OBJECT TO THE JUDGE'S CHARGE CONSTITUTES DELIBERATE BYPASS OF STATE COURT REMEDIES AND PRECLUDES FEDERAL HABEAS CORPUS REVIEW.

At the conclusion of his charge to the jury the Judge specifically asked whether there were any exceptions

to his charge. Petitioner's attorney stated that there were no exceptions (270). A failure to object has been deemed a waiver, foreclosing federal habeas review. Estelle v. Williams, 44 USLW 4609, May 4, 1976; United States ex rel. Satz v. Mancusi, 414 F. 2d 90 (2d Cir. 1969); United States v. Nasta, 398 F. 2d 283, 285 (2d Cir. 1968).

Moreover, petitioner's failure to object was a deliberate bypass of his state court remedies.

As the Court recently stated in the case Kibbe v. Henderson, __ F. 2d __ (2d Cir. 1976) decided April 8, 1976 "This Court has not hesitated to find a deliberate bypass that precludes federal habeas corpus relief when failure to make a contemporaneous objection mandated by the state's valid procedural rules, comported with trial strategy contrived by the defendant and his counsel." Petitioner tactically chose not to oppose the jury charge on affirmative defense, since it afforded him the benefit of alternatives and gave the jury two ways of acquitting him. In fact, in defense counsel's own summation while denying participation in the underlying felony he

also stressed that petitioner was unarmed and did not know that the other participants were armed (213, 214).

Moreover, this Court has found a deliberate bypass, based on failure to object, even where the issue was raised in the State appeal. United States ex rel. Cruz v. Henderson, 462 F. 2d 1125 (2d Cir. 1975).

As Justice Rehnquist noted in his concurring opinion in Mullaney v. Wilbur, 421 U.S. 684, 695 (1975) the Supreme Court in Fay v. Noia, 372 U.S. 391 (1963) held that failure to object to a proposed state court instruction should stand on a different footing from failure to appeal in that "It is one thing to fail to utilize the appeal process to cure a defect which already inheres in a judgment of conviction, but it is quite another to forego making an objection or exception which might prevent an error from ever occurring."

In the instant case, had petitioner submitted to the Judge a request to charge, or at the conclusion of the charge, objected or requested additional instruction,

any alleged error could have been cured. At no time did petitioner request that the judge not charge the jury on affirmative defense. Further, petitioner never objected to such a charge or requested a clarification of any portion of that charge.

In Mullaney v. Wilbur, supra at 695 Justice Rehnquist in not considering the merits of the defendants failure to object, noted that the issue was not contested by the state in the federal habeas corpus and the Supreme Judicial Court of Maine did not consider the failure to object.

In the instant case the failure to object was raised in the District Court and in the New York Court of Appeals; People v. Robinson, 36 N Y 2d 224, 228 (1974). The Court of Appeals in affirming petitioner's conviction stated: "The failure to object to the charge in this case, or to request further clarification at a time when the error complained of could readily have been corrected preserved no questions of law reviewable in this Court."

Thus, it is clear that since petitioner failed to object or request curative instructions he has deliberately bypassed his state remedies and precluded federal habeas corpus review.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
June 1, 1976

Respectfully submitted,

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Appellees

JOAN P. SCANNELL
Deputy Assistant Attorney General
Of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOAN P SCANNELL, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for respondent herein. On the 1 day of June, 1976 she served the annexed upon the following named person :

Ms. Ronald Kleinberg
575 Lexington Ave
NY NY

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Joan P Scannell

Sworn to before me this
1 day of June, 1976

Assistant Attorney General
of the State of New York